& Water Company. Judgment for defendant and plaintiff brings error. Reversed.

Jas. E. Heath, for plaintiff in error.
John W. Happer and *Frank L. Crocker,* for defendant in error.

LEWELLING'S ADM'R et al. *v.* LEWELLING.

March 10, 1910.

[67 S. E. 362.]

1. Partnership (§ 336*)—Suit for Settlement—Accuracy of Books of Account—Burden of Proof.—In a suit for the settlement of partnership affairs, the managing partner who kept the accounts had the burden of proving their accuracy.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. § 336.* 10 Va. W. Va. Enc. Dig. 884, 888.]

2. Partnership (§ 315*)—Dissolution—Accounting.—Where a partnership kept no books except such as showed open accounts of outside people dealing with the firm, and as far as the transactions of the two partners with each other went there was no documentary evidence from which a balance and settlement could be arrived at with any degree of accuracy, and a court of equity could not afford relief without resort to speculation or conjecture, a bill by the surviving partner for a settlement of the partnership affairs should be dismissed.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 731; Dec. Dig. § 315.* 10 Va.-W. Va. Enc. Dig. 884.]

Appeal from Circuit Court, Elizabeth City County.

Bill by Thomas I Lewelling against James Lewelling's administrator and others for a settlement of partnership affairs. From the decree, Henrietta E. Lewelling and others appeal. Reversed, bill dismissed, and cause remanded.

S. G. Cumming, S. J. Dudley, F. S. Collier, and *John W. Friend,* for appellants.
L. C. Phillips and *R. M. Lett,* for appellee.

SOUTHERN RY. CO. *v.* BAILEY.

March 10, 1910.

[67 S. E. 365.]

1. Railroads (§ 278*)—Injuries to Person at Station—Contributory Negligence.—Where a drayman at a depot stands on a cement side-

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

walk so close to a railroad track that he is injured by being struck by a portion of an approaching engine, and his view was clear and unobstructed for about 1,000 feet, and the track was straight for 767 feet, and the engine was moving five or six miles an hour, the drayman is negligent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 891; Dec. Dig. § 278.* 11 Va.-W. Va. Enc. Dig. 591 et seq.; 14 id. 867.]

2. Railroads (§ 274)*—Injuries to Person at Depot—Care Required.—Those controlling a railroad train approaching a depot or any other point at which it is reasonably to be expected that persons would be in danger must use reasonable care to avoid doing them an injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868, 872; Dec. Dig. § 274.* 11 Va.-W. Va. Enc. Dig. 591.]

3. Railroads (§ 377*)—Persons on Track—Last Clear Chance.—For an engineer to see a man on a railroad track is not necessarily to see that man in a position of danger, since, if in the possession of his faculties, such person may avoid the injury by using ordinary care to discover the approach of the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1280; Dec. Dig. § 377.* 11 Va.-W. Va. Enc. Dig. 580.]

4. Railroads (§ 390*)—Persons on Track—Last Clear Chance.—When it becomes apparent to those controlling a train that one on the track is unconscious of his danger, or is so situated as to be incapable of self-protection, it becomes the duty of those in control of the train to do all that they can consistent with their higher duty to others to save him from the consequences of his own act.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1325; Dec. Dig. § 390.* 11 Va.-W. Va. Enc. Dig. 580, 581; 14 id. 866. 10 id. 389, et seq.]

5. Railroads (§ 278*)—Injuries from Operation—Degree of Care.—The duty of guarding an individual against injury which the law imposes on a railroad company is no greater than that which the individual owes to care for his own safety.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 278.* 11 Va.-W. Va. Enc. Dig. 591, et seq.]

6. Railroads (§ 383*)—Persons on Track—Duty to Look Out.—It is the duty of a person on the track of a railroad to keep constant lookout for approaching trains.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1305-1310; Dec. Dig. § 383.* 11 Va. W. Va. Enc. Dig. 593.]

7. Railroads (§ 278*)—Injuries to Person at Depot—Concurring Negligence.— A drayman at a depot stood on a cement sidewalk so near the track that he was struck by a portion of an engine coming into the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

depot at five or six miles an hour. He could have seen the engine 1,000 feet away. The engineer of the engine also discovered the drayman, but made no effort to stop the train. Held, that the negligence of the drayman continued up to the moment of the injury, and, though the engineer was also negligent, the doctrine of last clear chance did not apply, since at any time the drayman, apparently in possession of all his faculties, could have stepped back and escaped injury, and hence it was a case of concurring negligence for which there could be no recovery.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 278:* 11 Va.-W. Va. Enc. Dig. 591, 592. See also, p. 580.]

Error to Circuit Court, Orange County.

Action by John S. Bailey against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

Williams & Tunstall, and *Shackelford & Shackelford,* for plaintiff in error.

A. T. Browning and *E. H. De Jarnett, Jr.,* for defendant in error.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.